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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 152

FRANK A. DiPIERRO,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition For Writ of Certiorari.

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OCTOBER TERM, 1962.

No. 1124.

FRANK A. DiPIERRO,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition For Writ of Certiorari.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court.

The questions herein presented were raised both in the Court of Appeals of Cuyahoga County and the Ohio Supreme Court. The Court of Appeals affirmed without writing an opinion, and the Ohio Supreme Court refused to certify and review.

The decisions of the state court were based on state law. There is, therefore, no substantial federal question involved.

QUESTION PRESENTED.

Petitioner claims he was deprived of his liberty without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States in that his conviction of a felony under a criminal statute of Ohio was obtained by inflammatory final argument of counsel for the State of Ohio which aroused the passion and prejudice of the jury against the petitioner.

STATEMENT OF THE CASE.

On Monday, July 11, 1960, after a meeting with one Jack Carson, Barbara Wagner made a telephone call to Frank DiPierro, the petitioner herein, and asked him to meet her at a motel on Euclid Avenue in Cleveland, Ohio. Some time before that DiPierro had given Miss Wagner his phone number, SK 1-7690, which she wrote down in her address book and on a business card (State's Exhibit 3). (R. 95-96, 100, 107, 109.) After Miss Wagner had called DiPierro, Jack Carson called Charlotte Erney, the prosecuting witness, at her home.

That same evening Charlotte Erney went from her home in Fairview Park, a suburb of Cleveland, to the motel, and a few minutes later was joined by Jack Carson and Barbara Wagner. About twenty minutes later they were joined by the petitioner, who was introduced to Miss Erney as Frank. (R. 5-8.) Frank asked Miss Erney if she was the girl in trouble. She answered him that she was (and after he told her that she was too old to get herself in that kind of trouble), they proceeded to talk about relieving her of her problem. (R. 19-21.) She asked him how much it would cost her and was told $600, that his normal price was $800 but because of Barbara he was dropping it to $600, that she was paying him not only

for the act itself but for the chance he was taking and for his experience. (R. 24.)

Miss Erney gave the petitioner a business card of the Fugazy Travel Bureau bearing her name. Frank asked Carson if he was the father of the baby and was told he was not. (R. 25-26.) Carson remembered Frank saying, "Something should be done soon." (R. 113.)

While taking Miss Erney home in his Cadillac, Frank asked her who was paying for this. Upon being told that she was, he said he could possibly make it a little easier and drop the price to $550 by leaving Barbara completely out of it and that if she had any further contract with Barbara she was to deny she had done anything about it. (R. 30-31.)

At her apartment Frank asked Miss Erney some questions and then examined her as described at R. 33. After they had agreed on nine o'clock the following Thursday, July 14, 1960 at the apartment as the time and place for the abortion, Frank gave Miss Erney certain instructions and told her that he would call her Tuesday or Wednesday to make sure she wanted to go through with it. (R. 32-34.) He did call the next day, Tuesday, identified himself as Mr. Frank, asked if she still wanted to go through with it, and reminded her again of his instructions. (R. 34-35.)

Frank DiPierro arrived at the agreed time on Thursday. Following his instructions, Miss Erney made herself ready in the bedroom. He then came into the room and proceeded with manual manipulation and the use of a catheter, followed by exercises, a process that was repeated twice. The petitioner instructed Miss Erney about retaining the catheter and gave her a box containing two types of pills, instructing her that the blue-green ones were for "effects" and the white one were to be taken only in case of serious hemorrhaging. (R. 37-42, 44.)

After putting on some clothing, Miss Erney took the money she had on a dresser. She tried to hand the money to the petitioner when they were in the kitchen. He would not take it there and went back into the bedroom, where she gave him $430 of the agreed $550, telling him it was all she had but that by the 15th of the month she could give him the rest at his office. (R. 45-46.)

The next day, Friday, the petitioner called Miss Erney at work to ask how she was and upon being told she had suffered great pain the night before, he told her this was normal. She asked him if he was going to be in the downtown area so she could pay him the remaining $120, telling him to come to her office and ask for her. That afternoon he came to the office of the travel agency accompanied by a man he introduced as Tony. The three went to a restaurant, where Miss Erney handed Frank an envelope containing $120. (R. 49-52.) Money taken by Miss Erney from her employer was paid to the petitioner for the abortion. (R. 85-86.)

Ten days later, July 25, Miss Erney consulted a physician, Dr. Sargis, because she was weak, dizzy and had been hemorrhaging, and she saw him again two days later. Dr. Sargis' examination on July 25th disclosed evidence of placental tissue and led him to an opinion that Miss Erney had had an incomple miscarriage. Later a notation was made by the doctor on the chart that the patient had what she stated was a criminal abortion. (R. 152-153.)

On State's Exhibit 2, a piece of paper, Miss Erney had written down a phone number, SK 1-7690, in the course of her last phone conversation with Frank, wherein he told her that if she ever had a girl to bring to him she should call him first and under no circumstances to give anyone

else the phone number. (R. 59.) The phone number was listed to Betty DiPierro at the address where the petitioner was apprehended. (R. 128.)

The petitioner was apprehended at his home as the result of questioning of Miss Erney by the police on August 24, 1960. A business card of the Fugazy Travel Bureau bearing Charlotte Erney's name (State's Exhibit 4) was removed from his billfold. He was identified by Miss Erney in a police line-up. He refused to answer any questions, and when confronted by Miss Erney at the police station he said he had nothing to say at that time. He refused to make any statement to the police.

Frank DiPierro was indicted November 2, 1960 on a charge of having procured an abortion in violation of section 2901.16 of the Revised Code of Ohio. Upon trial to a jury a verdict of guilty as charged was returned and Frank DiPierro was sentenced to the Ohio State Penitentiary.

ARGUMENT.

The prosecuting attorney made the following statement in final argument:

> "This case involves the citizens of this community, the millions of men and women that you represent. It involves the Defendant, the State of Ohio. It involves one of the most serious crimes that a person can commit. It involves the abortion racket, which at the present time is the third largest racket in the United States." (R. 226.)

Defense counsel had argued that the case involved only one man, one woman. The prosecutor's statement and reference to abortion racket was made in answer to the argument of defense counsel. The trial court sustained an objection to the prosecutor's statement and instructed

the jury to disregard it. The prosecutor did not pursue the subject further.

The petitioner further claims that the prosecutor's argument that "These two other people (Miss Wagner and Mr. Carson) * * * were scared to death when they were called on the witness stand" implies that the petitioner had done something to scare them from testifying as the State wanted them to testify. The petitioner's inference is unwarranted. It is obvious from reading the record that these two people were, to say the least, reluctant witnesses, and in the circumstances of this case that is not surprising. Moreover, an objection to this argument was sustained by the court, and the jury instructed to remember the evidence as it was adduced at the trial.

At R. 203 and again at R. 250 the trial court instructed the jury that closing arguments do not constitute evidence in the case and must not be considered as such.

In *State v. Lett*, 106 Ohio App. 285, 154 N. E. 2d 445, the defendant claimed he was prejudiced by misconduct of the prosecutor in making the following statement: "Ladies and gentlemen, we have tried our best to remove what we think is a cancerous situation in the city of Dayton and in this community. We hope you will help us remove it." The appellate court stated in the opinion at p. 289:

> "It is customary and permissible for a prosecutor to deplore crime and to speak disparagingly of persons on trial accused of crime. So long as he does not exceed the bounds of reason and good taste so as to create a danger of inflaming and unduly influencing the jury, there can be no complaint. Views may differ as to when the limits of propriety are reached. The court here sustained the defendant's objection to the statement made and instructed the jury to disregard it. We must presume that the jury proceeded regularly in observing this admonition. The words do not appear to be so highly inflammatory as to prevent

the jury from deciding the cause upon fair and calm deliberation. The defendant's further motion to withdraw a juror and declare a mistrial was, therefore, properly overruled."

In *Dorger v. State*, 40 Ohio App. 415, 179 N. E. 143, error dismissed 124 O. S. 659, certiorari denied, 284 U. S. 689, 76 L. ed. 581, it was held that improper argument in a bank embezzlement prosecution appealing to sympathy for defrauded depositors, provoked by improper argument appealing to sympathy for accused's child, was not reversible error under evidence and instructions.

The petitioner cites *Deutsch v. State*, 46 Ohio App. 223. In that case the prosecuting attorney's argument not only made lengthy references to terrorism of the underworld, gangland, racketeers but also discussed the right of the defendant to have the proceedings reviewed by higher courts, the import of which was that if the jury's verdict was wrong the defendant would have his remedy.

The petitioner cites *State v. Cloud*, 14 O. O. (2d) 132, 168 N. E. 2d 761. The arguments which the appellate court found objectionable in the *Cloud* case went much further than the mild statements the petitioner here complains of.

The prosecutor's statement, made in answer to a challenging statement by counsel for the petitioner, was not of such a character as to prevent a fair trial of the cause. Furthermore, after the trial court sustained an objection and instructed the jury to disregard the statement, the prosecutor did not refer to the subject again. The trial court, in its general charge, twice instructed the jury that closing arguments do not constitute evidence and must not be considered as such.

In *State v. Landrum*, 96 Ohio App. 333, 54 O. O. 343, appeal dismissed 160 O. S. 358, wherein argument by the prosecuting attorney on a matter admittedly not in evi-

dence was objected to by defense counsel and the jury was instructed to disregard it, the court said: "We feel the timely objection and immediate instruction to the jury cured any possible prejudice to the defendant with respect to this matter."

CONCLUSION.

In affirming the judgment of the trial court wherein the petitioner was convicted, the Court of Appeals of the Eighth Appellate District of Ohio concluded and held, after a careful reading of the bill of exceptions and consideration of the assignments of error (including the question here presented) that no error intervened in the trial that was prejudicial to the substantial rights of the defendant or that prevented him from having a fair trial. (Section 2945.83, Revised Code of Ohio.) The Supreme Court of Ohio properly overruled petitioner's motion for leave to appeal. There is therefore no substantial federal question involved, nor is there any debatable constitutional question involved herein. Under the question presented in the petitioner's brief this Court has no jurisdiction to review this case and the petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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GEORGE J. MOSCARINO,
Assistant Prosecuting Attorney.
Attorneys for Respondent.

APPENDIX I.

Section 2945.83, Revised Code of Ohio. *When new trial shall not be granted.*

No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

(A) An inaccuracy or imperfection in the indictment or information, or warrant, provided that the charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him;

(B) A variance between the allegations and the proof thereof unless the accused is misled or prejudiced thereby;

(C) The admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby;

(D) A misdirection of the jury unless the accused was or may have been prejudiced thereby;

(E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial.